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No. 33373-2-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DEPUTY

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STATE OF WASHINGTON,

Respondent,

vs.

**Richard Sibert,**

Appellant.

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Lewis County Superior Court

Cause No. 04-1-00284-2

The Honorable Judge H. John Hall

**Appellant's Reply Brief**

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## ARGUMENT

### **I. THE ERRONEOUS KNOWLEDGE INSTRUCTION REQUIRES REVERSAL UNDER *STATE V. GOBLE*.**

Without citation to authority, Respondent first argues that “[t]he burden is on the Appellant to show the jury was misled” as a factual matter, analogizing to instances of jury misconduct. Brief of Respondent, p. 1. This is incorrect. The actual effect on the jury is irrelevant, since the actual effect would inhere in the verdict. *See, e.g., State v. Linton*, 132 P.3d 127 at 133 (2006).

The Due Process Clause of the Fourteenth Amendment requires that convictions be based on proof beyond a reasonable doubt of every element of the charged offense. *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions, when taken as a whole, must properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997). Jury instructions are reviewed *de novo*. *Joyce v. Dept. of Corrections*, 155 Wn.2d 306 at 323, 119 P.3d 825 (2005). A jury instruction which

misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

The “knowledge” instruction given here included the following optional language (bracketed in WPIC 10.02): “Acting knowingly or with knowledge also is established if a person acts intentionally.” Instruction No. 18, Supp. CP.<sup>1</sup> This language allowed the jury to presume that Mr. Sibert acted knowingly if he took *any* intentional act, but did not give any guidance as to what intentional act could trigger the mandatory presumption. Accordingly, the prosecution was relieved of establishing knowledge by proof beyond a reasonable doubt. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005) addressed an identical instruction and found that it violated the defendant’s constitutional right to due process.<sup>2</sup> The court also found the instruction confusing. *Goble*, at 203 (“We agree that the instruction is confusing.”)

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<sup>1</sup> The final sentence is bracketed in the WPIC because it is to be used only where applicable.

<sup>2</sup> The court’s opinion in *Goble* was issued 13 days after Appellant’s Opening Brief was filed. Curiously, Respondent does not address the effect of *Goble* on this case.

Given this court's ruling in *Goble*, the instruction is erroneous, and relieved the prosecution of establishing an element by proof beyond a reasonable doubt

Respondent has made no effort to show beyond a reasonable doubt that that the erroneous instruction did not contribute to the verdict, as required by *Brown, supra*. Under the faulty instruction, the jury could have been confused, and could have applied the mandatory presumption based on any intentional act Mr. Sibert engaged in. This violates due process; accordingly, the conviction must be reversed and the case remanded to the trial court. *Goble, supra*.

Respondent next suggests that the instruction was not erroneous, but rather "simplify[ied] the statute into layman's terms." Brief of Respondent, p. 2. This court's decision in *Goble* refutes that suggestion. Furthermore, Respondent's line by line comparison is flawed, in part because Respondent misquotes the statute.

Under RCW 9A.08.010(1)(b), "A person knows or acts knowingly or with knowledge when (i) he is aware of a fact, facts, or circumstances or result *described by a statute defining an offense...*" *Emphasis added*. Under the statute, knowledge is awareness of a fact (described by a statute that defines an offense). Under the instruction, knowledge is an awareness

of a fact, where the fact itself is a crime. This is the problem that the *Goble* court found confusing. *Goble*, at 203.

Because Mr. Sibert's conviction rests on an unconstitutional instruction, and because the prosecution has failed to establish beyond a reasonable doubt that the error did not affect the verdict, the conviction must be reversed. The case must be remanded to the trial court for a new trial. *Goble*, *supra*.

**II. THE COURT'S "TO CONVICT" INSTRUCTIONS DID NOT REQUIRE THE JURY TO DETERMINE THE IDENTITY OF THE CONTROLLED SUBSTANCE; NOR WAS THE JURY REQUIRED TO DO SO BY SEPARATE INSTRUCTION.**

Without citation to authority, Respondent asserts that the elements which must be included in the charging document are different than the elements which must be included in the jury instructions. Brief of Respondent, p. 3. Where no authority is cited, this court may presume that counsel, after diligent search, has found none. *Oregon Mut. Ins. Co. v. Barton*, 109 Wn.App. 405 at 418, 36 P.3d 1065 (2001).

Respondent also implies that the identity of the controlled substance is not an element of the offense. Brief of Respondent, p. 3-4, citing RCW 69.50.[401](1).<sup>3</sup> According to Respondent,

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<sup>3</sup> Respondent actually cites RCW 69.50.410, the statute criminalizing sale of controlled substances for profit.



“methamphetamine” is simply a *definition* of the phrase “controlled substance,” much like the definition of “sexual contact” addressed in *State v. Lorenz*, 152 Wn.2d 22 at 31, 93 P.3d 133 (2004). Brief of Respondent, p. 4-6.

A more accurate comparison would be to the cases interpreting the bail jumping statute, since that statute is structured similarly to RCW 69.50.401. Like delivery of a controlled substance, the bail jumping statute, RCW 9A.76.170, defines a base crime (missing court), which can be aggravated by proof of an additional fact (the seriousness of the underlying offense). For example, in *State v. Gonzalez-Lopez*, 132 Wn. App. 622 at 638 (2006) the court of appeals found the trial court’s “to convict” instruction adequate because it set forth the elements of the base crime, and also required the jury to find that the defendant had been charged with a specific underlying offense.

In fact, however, the Washington Supreme Court has held that the aggravating element may be bifurcated from the “to convict” instruction, but the jury must be required to unanimously find the aggravating fact by proof beyond a reasonable doubt:

We hold that where the legislature has established a statutory framework which defines a base crime which is elevated to a greater crime if a certain fact is present, a trial court may, consistent with the guaranties of due process and trial by jury, bifurcate the elevating fact into a special verdict form. So long as

the jury is instructed it must unanimously agree beyond a reasonable doubt before it may affirmatively answer the special verdict, the constitution is not offended.

*State v. Mills*, 154 Wn.2d 1 at 10, 709 P.3d 415 (2005).

*See also State v. Davis*, 154 Wn.2d 291 at 306-307, 109 P.3d 415 (2005), *citing Mills, supra*. The Court went on to emphasize “that while such bifurcation is constitutionally permissible, it is not constitutionally required.” *Mills, supra*, at 10 n. 6.

Here, the identity of the controlled substance was not a part of the “to convict” instruction; nor was the jury required to identify the controlled substance by separate instruction, as permitted under *Mills* and *Davis, supra*. The instruction cited by Respondent to make up for the deficiency in the “to convict” instruction did not require the jury to determine the identity of the substance. *See* Brief of Respondent, p. 4, *citing* Instruction 15, CP 19.

Accordingly, the conviction must be reversed and the case remanded for a new trial. At a retrial, the identity of the controlled substance must either be included in the “to convict” instruction or bifurcated into a separate instruction, in which it is made clear that the jury is required to determine the identity of the controlled substance by proof beyond a reasonable doubt.

**III. MR. SIBERT'S SENTENCE MUST BE VACATED AND THE CASE REMANDED FOR A NEW SENTENCING HEARING UNDER *STATE V. EVANS*.**

Respondent claims that the jury's failure to determine the identity of the substance in this case can be remedied by the incorporation of the Information into the verdict form. Brief of Respondent, p. 7-8.

Respondent cites no authority for this novel theory; accordingly, this court should presume there is no authority for Respondent's position. *Oregon Mut. Ins. Co. v. Barton*.

In fact, this court has determined that the jury's failure to determine the identity of the controlled substance in a case such as this violates *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). See *State v. Evans*, 129 Wn. App. 211 at 229, 118 P.3d 419 (2005) ("Under *Blakely*, the trial court invaded the province of the jury when it sentenced Evans under former RCW 69.50.401(a)(1)(ii) because this necessarily involves a factual finding that Evans manufactured and unlawfully possessed methamphetamine base with intent to deliver.) *Evans* is consistent with the holding of *Mills* and *Davis*, discussed in the preceding section.

The jury did not determine the identity of the controlled substance; because of this, Mr. Sibert's sentence should not have been enhanced beyond the minimum sentence permitted for a delivery or possession with

intent to deliver charge. The trial court's decision imposing a higher sentence violated Mr. Sibert's Sixth Amendment right to a jury trial under *Blakely*. An error of this type is structural, and can never be harmless. *State v. Hughes*, 154 Wn.2d 118; 110 P.3d 192 (2005). Accordingly, the case must be remanded for sentencing within the lowest possible standard range, 6-18 months. See RCW 9.94A.517.

**IV. THE TRIAL COURT VIOLATED MR. SIBERT'S CONSTITUTIONAL RIGHT TO A JURY TRIAL IN VIOLATION *BLAKELY V. WASHINGTON* BY IMPOSING AN AGGRAVATED SENTENCE WITHOUT A JURY DETERMINATION OF HIS PRIOR CONVICTIONS.**

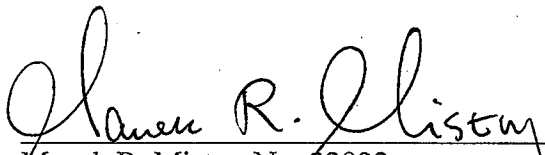
Appellant stands on his opening brief; this section is included for preservation of error.

**CONCLUSION**

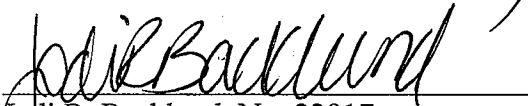
For the foregoing reasons, Mr. Sibert's convictions must be vacated, and the case remanded for a new trial. In the alternative, his sentence must be vacated and the case remanded for sentencing within the standard range of 6-18 months.

Respectfully submitted on June 8, 2006.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief #:

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Richard Sibert, DOC # 800328  
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE  
LAWS OF THE STATE OF WASHINGTON THAT THE  
FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington, on June 8, 2006.

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